Neutral Citation Number: [2026] EWHC 531 (Ch)

Case No: PT-2024-000636

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

11 March 2026

Before :

MRS JUSTICE BACON

- -

Between :

CREST NICHOLSON REGENERATION LIMITED

Claimant

- and -

(1) PIERS HENRY CALVERT AND RUTH MARGARET CALVERT
(as executors of the Estate of Henry Clifton Calvert, deceased)
(2) PIERS HENRY CALVERT
(3) HENRIETTA AMELIA CALVERT

Defendants

- -
- -

Joanne Wicks KC (instructed by **Winckworth Sherwood**) for the **Claimant**
Stephanie Tozer KC and Fern Schofield (instructed by **Forsters LLP**) for the **Defendants**

Hearing dates: 3–5 February 2026

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APPROVED JUDGMENT

This judgment was handed down remotely at 10.30 am on 11 March 2026 by circulation to the parties or their representatives by email and by release to the National Archives.

Mrs Justice Bacon:

Introduction

1. These are proceedings brought under CPR Part 8, to determine the legal effect of an option agreement granted to the claimant (**Crest**) for the purposes of the acquisition of land forming part of Holmbush Farm near Bewbush, between Crawley and Horsham (the **Bewbush land**), owned by one or more of the defendants (who I will refer to collectively as the **Calverts**). The original option agreement was entered into in 2002 (the **2002 agreement**), and related to part of the Bewbush land. The agreement was subsequently amended by further agreements in 2006 and 2010, which added further parts of the land into the option arrangements. The dispute concerns the effect of the original agreement and the subsequent amendments.

2. The position as it stands is that Crest has acquired part of the land from the Calverts pursuant to the 2002 agreement, and is currently building houses and associated infrastructure on that land. It contends that the effect of the 2002 agreement, as amended, was to give it an option to obtain a lease over the remaining land, together with an option to acquire the freehold interest in that land. The Calverts contend that the option agreement only entitles the claimant to obtain a licence in relation to the remaining land, and that the option to acquire the freehold reversion is now void for perpetuity and cannot be exercised by Crest.

3. The dispute between the parties turns on a series of issues relating to the application and interpretation of the Perpetuities and Accumulations Act 1964 (the **1964 Act**), the Perpetuities and Accumulations Act 2009 (the **2009 Act**), and the terms of the various option agreements and associated contractual documentation.

4. The hearing took place over three days. Crest was represented by Ms Wicks KC; the Calverts were represented by Ms Tozer KC and Ms Schofield. In the course of the reply submissions of Ms Wicks, various new authorities were referred to. I therefore allowed Ms Tozer and Ms Schofield to file brief written submissions responding to those authorities, followed by a brief written reply from Ms Wicks. On 25 and 26 February 2026 counsel filed further written submissions in response to questions from the court as to the consequences of the arguments on the lease/licence issue. I have taken account of all of the post-hearing written submissions in this judgment.

5. Following circulation of my draft judgment on 2 March 2026, counsel on both sides asked me to address a further point in relation to the 2006 and 2010 agreements which extended the land covered by the option arrangements. The point does not need to be determined on the basis of my main conclusions below, but might require determination if the matter goes further. I have therefore addressed this further issue in this judgment.

Witnesses

6. The parties each relied on the evidence of a single witness. Crest's witness was Nicholas Naoroze Daruwalla-Thompson, a Land Director at Crest Nicholson (South) Limited. He has worked in various divisions of the claimant since 2014, and has led a team working on the delivery of the Bewbush development since November 2022. His evidence explained Crest's strategic approach to the development of sites such as the Bewbush land, about the timing of land purchase and planning permissions, and the negotiation of

option agreements reflecting that approach. In relation to the Bewbush development specifically, he set out his understanding of the history of the 2002 option agreement based on the archive documents which had been disclosed by Crest. In terms of more recent events his evidence covered his involvement in and knowledge of Crest's communications with the defendants since early 2023.

7. Mr Daruwalla-Thompson was briefly cross-examined by Ms Tozer KC on the first day of the trial, giving evidence that was entirely straightforward. I consider him to be a transparently honest and reliable witness; and indeed Ms Tozer did not ultimately seek to challenge any of his evidence.

8. The Calverts relied on the evidence of Piers Calvert, who is the second defendant and (as executor) one of the first defendants. He provided a witness statement explaining his understanding of his father's intentions in entering into the 2002 agreement, his own involvement in the subsequent agreements, and the specific events which gave rise to the present dispute between the parties. Crest did not seek to cross-examine him at the trial, and very little turned on his evidence.

Factual background

The parties

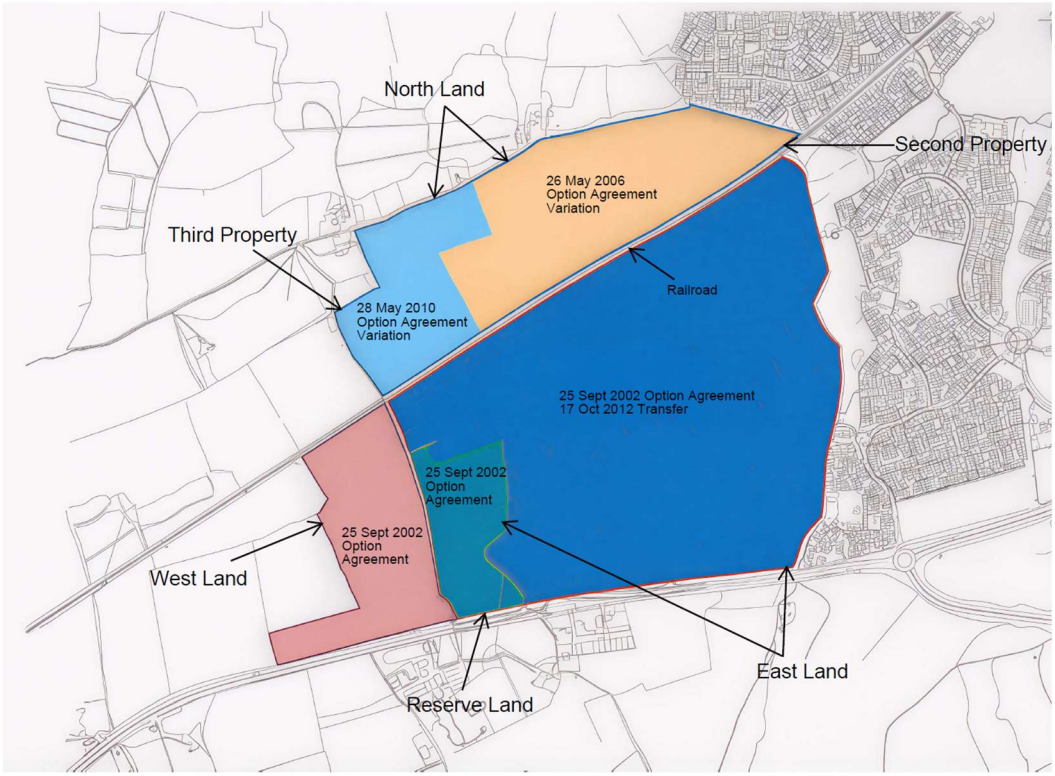
9. Crest is a leading UK residential property developer, which operates primarily in the south of England and the Midlands.

10. The defendants are between them the executors and children of the late Henry Calvert, who died in January 2013. Piers Calvert and his mother, Ruth Calvert, make up the first defendant, as executors of the estate of Henry Calvert. Piers Calvert is also the second defendant, in his own right, and his sister Henrietta Calvert is the third defendant.

The Bewbush land

11. The present proceedings concern different parts of the Holmbush Farm land, which were the subject of a series of agreements made between Crest and the Calverts from 2002 onwards. Before the events that gave rise to the present proceedings, Henry Calvert owned the entirety of the Holmbush Farm site. Shortly before the conclusion of the 2002 option agreement, he transferred part of the land, known as the Reserve Land, into a family trust for tax planning purposes. As set out further below, other parts of the land were later transferred to Piers and Henrietta Calvert.

12. We were provided with the following map of the Bewbush land that was the subject of the 2002 agreement and the subsequent amendments to that agreement.



13. The **Reserve Land** is the area coloured blue with green hatching, between the railway line and Crawley Road. The **East Land** comprises the Reserve Land together with the remainder of the area coloured blue. The area coloured pink is the **West Land**. To the north of the railway line, the area coloured beige is referred to as the **Second Property**, and the area coloured light blue is referred to as the **Third Property**. The Second and Third Property together comprise the **North Land**.

Negotiation of the 2002 agreement

14. It appears that Crest started discussions with Henry Calvert at some point in 2000, regarding a potential acquisition of part of the Holmbush Farm land on the outskirts of the village of Faygate, for development purposes. Those discussions did not bear fruit, but the following year the parties started to negotiate an option agreement for a different part of the Holmbush Farm land, on the outskirts of Bewbush.

15. Around the same time Crest had also been negotiating options over two other sites, Tadpole Farm near Swindon, and Hill Place Farm near East Grinstead, and had been considering ways in which it could achieve an extension of the option periods beyond the 21-year perpetuity period for option agreements set out in the 1964 Act. The difficulty for Crest, as Mr Daruwalla-Thompson explained, was that if it entered into an option agreement with a view to acquiring land for development, it might well take longer than 21 years to secure planning permission and manage the delivery of the development, including any land remediation work and delivery of infrastructure.

16. By June 2001 Crest had received legal advice from its solicitors, Davies Arnold Cooper (**DAC**) that it could achieve a longer period by agreeing an option for a lease of the land, with a further option during the term of the lease for Crest to buy the freehold reversion in tranches when planning permission was obtained. The solicitors acting for Crest in relation to the Hill Place Farm site, Campbell Hooper, were not immediately convinced.

On 24 July 2001 Stephen Siddall from that firm wrote to Crest expressing concern that the arrangement might not be enforceable on perpetuities grounds, and opining that even if it worked it would not constitute an interest in land that could be protected by registration so as to bind successors. His advice was that:

> "Assuming the Lease route, the grant of a Lease to Crest brings with it an entitlement to possession and occupation and to the receipt of rents and profits from the land. In order to be effective, therefore, there would have to be a Lease to Crest and a contemporaneous Underlease from Crest back to the owners."

17. On the same day as that letter was sent, Stephen Beare, a chartered surveyor instructed by Crest, sent draft heads of terms for the Bewbush site to Tim Raikes, the Calvert family's land agent. Those terms set out an initial option period, during which Crest would be able to call for a "non-occupational Lease" providing a further option to purchase the freehold reversion. The draft noted that "as the Lease granted to the Purchaser would be non-occupational, the Vendor will continue to accrue any income from the land prior to it being developed by the Purchaser". In his cover letter Mr Beare said that the arrangement was not novel, as Crest had deployed it on other major projects. He added that:

> "This arrangement does not impact upon your client's ability to continue to enjoy the occupation of the land or to sell the freehold. The income stream from the use of the land and the presence of buildings thereon during the lifetime of the Option Agreement and the term of the lease, would be preserved."

18. It appears from the available documents recording the subsequent negotiations that the Calverts and their solicitor Julian Whately (now also deceased) asked for clarification of the arrangements proposed. In October 2001 DAC provided Crest with a first draft of the option agreement, advising that it would need to make provision for a leaseback of the property to the vendor upon the lease option being exercised, with that leaseback including a farm business tenancy for the area of the property that was subject to farming use.

19. There were then further negotiations between the parties (led by Mr Beare and Mr Raikes, respectively) which extended to summer 2002. In April 2002 Henry Calvert decided to seek tax advice on the consequences of the proposed lease option. Advice was given by Peter Horsman at Saffery Champness, accountants, in June 2002, particularly addressing the availability of business asset taper relief if land was leased to the purchaser but continued to be used by the Calverts for their own trading purposes by virtue of an agricultural tenancy granted by the leaseholder. Mr Horsman considered that this would be eligible for taper relief, although he thought that the alternative view was not unarguable. Mr Horsman also considered the possibility of transferring part of the land into a family trust. That led to the transfer of the Reserve Land into trust, with the trustees being Henry Calvert, Mr Raikes and Mr Whately (the **Trustees**).

20. The option agreement was eventually entered into on 25 September 2002, between Crest and the Trustees, in relation to the Reserve Land, and between Crest and Henry Calvert, in relation to the remaining land covered by the option agreement.

Terms of the 2002 agreement

21. The 2002 agreement formed part of a package of three main documents: the 2002 agreement itself, which was the original option agreement, a draft lease, and a draft farm business tenancy. A key dispute between the parties is whether the terms of the draft lease should be regarded as giving rise to what is in substance a licence rather than a lease. Accordingly, at the hearing the document was referred to neutrally as the "lease/licence", and this judgment adopts the same expression.

22. The 2002 agreement itself related to the East Land (including the Reserve Land) and the West Land, together with a strip of land on the northern side of the railway line anticipated to be needed for infrastructure (the **Additional Land**). Clause 2.1 provided:

> "In consideration of the payment by the Purchaser of the First Instalment of the Initial Option Premium the receipt of which is acknowledged by the Vendor and subject to the payment of the balance of the Initial Option Premium in accordance with Clause 2.5 the Vendor hereby grants to the Purchaser during the Option Period:
>
> 2.1.1 the option to purchase the whole of the Property and/or the Additional Land which comprises Development Land and/or Infrastructure Land
>
> 2.1.2 the separate options to purchase such part or parts of the Property and/or the Additional Land as are identified in Valuation Notices in accordance with this Agreement which comprises Development Land and/or Infrastructure Land
>
> 2.1.3 the option to take a Lease of the Leasehold Land in accordance with the provisions of Clause 7."

23. The option period was defined in clause 1.1 as an initial period of ten years, extended by 11 years if a further option premium was paid, giving a total of 21 years. Clause 6 provided (among other things) that a condition of exercise of the option to purchase was that planning permission had been granted for the relevant tranche of land.

24. Clause 7 provided the lease option referred to in clause 2.1.3, as follows:

> "7.1 Notwithstanding the provisions of Clause 6 the Lease Option shall be exercisable at any time after the period of 20 years commencing on the Commencement Date and after the payment of the Additional Option Premium but prior to the expiry of the Option Period by the Purchaser serving notice in writing on the Vendor ('the Lease Option Notice') exercising the Lease Option in relation to the whole or any part or parts of the Property in respect of which the Purchaser has not served an Option Notice and which is or are subject to a Planning Permission and/or which parts of the Property have been allocated for Development on a Development Plan and/or a draft Development Plan and/or in relation to the whole or any part or parts of the Additional Land in respect of which the Purchaser has not served an Option Notice and any such notice shall be accompanied by a statement of the area of

land to which such notice relates and a copy plan accurately indicating the position of such land

7.2 The service of a Lease Option Notice shall automatically create a binding contract for the Vendor to grant and the Purchaser to accept a Lease of the Leasehold Land in accordance with the Provisions of this Clause

…

7.4 The Lease shall be in the form of the draft lease annexed hereto and marked 'A' together with:

7.4.1 such amendments as either party shall reasonably require and the other shall approve (such approval not to be unreasonably withheld or delayed) but not so as to change the commercial effect thereof and/or

7.4.2 such amendments as may be required as a result of any changes in the law …

7.5 The Lease shall be for the Term commencing on the date of completion of the Lease and the annual rent reserved by the Lease shall be one peppercorn

7.6 On completion (and as a condition thereof) the Purchaser shall grant and the Vendor shall accept a Farm Business Sublease of the Leasehold Land

…

7.7 The Farm Business Sublease shall be granted for the Term (less 3 days) commencing on the date of completion of the Lease"

25. The term of the lease was calculated according to a formula in clause 1.1, which turned on the area of the property which had either the benefit of planning permission or had been allocated for development on a development plan, and the number of years that commencement of the development was deferred due to the provisions in the development plan.

26. The lease/licence attached to the 2002 agreement provided for a "demise" of the relevant premises to Crest, and was expressed throughout as a lease, with conventional covenants on both sides including a covenant of quiet enjoyment at clause 4.1. The lease/licence nevertheless included in clause 6.3 the following provision, upon which considerable debate has turned:

> "The Tenant shall not be or become entitled to occupy the Premises and shall not be entitled to exercise any rights in respect thereof save as specifically granted herein and in the [First] Schedule to this Lease PROVIDED ALWAYS THAT the Tenant and its duly authorized agents may have access to the Premises from time to time pursuant to and in accordance with the provision of Paragraph 17 of Part I of the [First] Schedule"

27. Clause 7 was entitled "Option to purchase the reversion". It provided:

> "The Landlord grants to the Tenant the options during the Option Period from time to time and on the terms set out in the [First] Schedule hereto to purchase the freehold reversion in the Premises or any part thereof".

28. The option period was defined as the term of the lease plus any extension as agreed under the terms of the lease, with clause 8 providing for an extension of the lease term for up to five years.

29. The other relevant document attached to the 2002 agreement was the draft farm business tenancy agreement. That provided for a lease of the property for a peppercorn rent, with termination provisions to allow Crest to terminate the agreement in respect of any part of the property which was required for development, in respect of which Crest had served an option notice as defined in the head lease.

30. It is common ground that the structure of the 2002 agreement together with the attached lease/licence and draft farm business tenancy was as follows:

    i) The 2002 agreement itself granted Crest the option to acquire the land or part of the land once planning permission had been obtained. This option was referred to by the parties as the **first freehold option**. Assuming extension of the period, the option was exercisable for 21 years from the date of the 2002 agreement, expiring on 24 September 2023.

    ii) In the last year of the first freehold option period, Crest had the option to call for a lease of all or part of the remaining land over which the first freehold option had not been exercised. I will refer to this as the **lease option**.

    iii) If exercised, the lease option as drafted provided an option to acquire the freehold reversion to the lease. This option was referred to by the parties as the **second freehold option**.

The 2006 agreement

31. On 26 May 2006 Crest, Henry Calvert and the Trustees entered into a variation agreement which added the Second Property to the option arrangements. The 2002 agreement and lease/licence were thereby amended to refer to the Second Property, but the key clauses of both documents (including those set out above) were unchanged. The draft farm business tenancy was unchanged.

32. In 2009 Henry Calvert transferred the North Land (which as set out above included the Second Property, plus the Third Property which at that time was not within the option arrangements) to his children, Piers and Henrietta Calvert. On 3 December 2009 Piers and Henrietta Calvert signed a Deed of Covenant and Adherence by which they covenanted to adhere to the terms of the original option agreement, as amended by the 2006 agreement.

The 2010 agreement

33. On 28 May 2010 the Third Property was added to the option arrangements, by way of a supplemental agreement entered into by Crest, Henry Calvert, the Trustees, and Piers and

Henrietta Calvert. Again, the result of that agreement was that the 2002 agreement was amended to refer to the Third Property, but the key clauses were unchanged. The lease/licence and draft farm business tenancy were unchanged.

34. Further supplemental agreements were entered into on 17 October 2011 and 12 October 2012, which are not material for present purposes.

Subsequent events

35. Crest obtained planning permission in respect of the East and North Land (other than the Reserve Land) in July 2010, for a development of 2,500 homes. Planning permission was later obtained for further homes to be built on the Reserve Land, with a further planning application pending. On the basis of those grants of planning permission Crest's sister company, Crest Nicholson Operations Limited, acquired the East Land in two tranches, on 17 October 2012 and 30 September 2020. Further planning applications have been submitted for the North Land and are pending.

36. Meanwhile, Henry Calvert died in January 2013 and his estate passed to his executors, namely Ruth and Piers Calvert.

37. On 22 February 2023 Crest served a lease option notice in respect of the North and West Land, marked up in a plan attached to the notice. The solicitors then acting for the Calverts raised some queries about that notice and the attached plan, leading Crest to reissue and re-serve the lease option notice on 12 April 2023 in respect of a slightly amended area of the option land. There were then protracted discussions between the solicitors on each side regarding the terms of the lease to be executed, and the accompanying plan of the land.

38. On 18 September 2023, the Calverts' solicitor accepted that the 12 April 2023 notice was validly served as a lease option notice pursuant to the 2002 agreement as amended. For the avoidance of any doubt, however, on 19 September 2023 Crest served a further lease option notice in the same form as the 12 April 2023 notice, but without prejudice to the validity of the previous notice. For the purposes of these proceedings, the parties have agreed to treat the September notice as the exercise of the lease option.

39. Despite the fact that the lease was by then agreed, on 22 September 2023 the Calverts' solicitor sent Crest's solicitor an email saying, rather cryptically, that

> "Although I do hold documents signed by all my clients I am instructed not to complete the lease at the present time. I accept this may sound odd given that we have an agreed form of lease but there are reasons that I am not able to discuss this at the moment although I hope that I shall be in a position to give you more detail on this early next week. I'm sorry that this upsets plans for completion this week but I'm afraid that is where we are with this."

40. The 21st anniversary of the 2002 agreement was on 25 September 2023. The very next day, on 26 September 2023, the Calverts' solicitor sent a formal letter stating that although the parties had "notionally" agreed a form of lease, the Calverts now contended that this was a licence, on the basis that the agreement lacked the "key requirement" of possession. Furthermore, the letter continued:

> "to the extent that the licence or the Option creates an obligation to grant your client a further option then this would be contrary to the rule against perpetuities and would make any such provision ineffective."

41. Crest's unchallenged evidence was that this was the first time that the Calverts or their solicitors had ever raised this point. Crest had invested time and resources in the development, including in seeking planning permission, with the intention of drawing down the North and West Land pursuant to the option arrangements agreed in the 2002 agreement and the subsequent variations to that agreement. Infrastructure had been delivered on the East Land which was intended to serve the development on the North Land, and Crest's commercial plans had been drawn up on the basis of the potential to proceed to acquire the North and West Land following the grant of planning permission. Crest was therefore (and remains) concerned to retain the second freehold option under the lease/licence agreement.

Procedural background

42. No resolution to the matter having been reached, Crest sent a letter before claim on 16 October 2023. It then issued its Part 8 claim on 24 July 2024 seeking a declaration that the second freehold option is valid and not void for perpetuity, such that the Calverts are obliged to grant that option to Crest upon execution of the lease to be granted pursuant to the lease option. Crest also seeks an order for specific performance of the lease option.

43. Directions were given by Master McQuail on 27 January 2025 providing for the filing of Points of Claim, Points of Defence and Points of Reply, as well as limited disclosure and witness evidence.

The rule against perpetuities

44. Before setting out the issues in dispute between the parties it is necessary to explain the rule against perpetuities, as modified by the 1964 and 2009 Acts.

45. The rule against perpetuities was originally a common law rule. The effect of the rule was that any future interest in any property was void from the outset if it might possibly vest after the perpetuity period has expired. The perpetuity period for these purposes consisted of any life or lives in being, together with a further period of 21 years and any period of gestation: Megarry & Wade, *The Law of Real Property* (10th ed, 2024), §8-018. The policy underlying the rule was a desire to constrain the extent to which landowners might dictate the ownership of their estate far into the future, leaving the ultimate ownership of property uncertain for a significant period of time.

46. The rule against perpetuities did not apply to purely personal obligations created by contract. Contracting parties (and if deceased their representatives) could therefore be sued on contractual obligations to create property interests, even if the property interests themselves would have been void as against third parties under the perpetuities rule: Megarry & Wade, §§8-130–131.

47. The 1964 Act changed the law relating to perpetuities in several important respects relevant to the present case. First, s. 3(3) provides:

> "Where … a disposition consisting of the conferring of any power, option or other right would be void on the ground that the right might be exercised at too remote a time, the disposition shall be treated as regards any exercise of the right within the perpetuity period as if it were not subject to the rule against perpetuities and, subject to the said provisions, shall be treated as void for remoteness only if, and so far as, the right is not fully exercised within that period."

48. That provision is described as the "wait and see" principle. Its practical effect is that the disposition of a property right is not automatically void from the outset, simply because it might vest outside the perpetuity period. Rather, the disposition is only void in so far as the relevant right is not exercised within the perpetuity period.

49. Secondly, s. 9 introduces specific provisions for options to acquire interests in land, as follows:

> "(1) The rule against perpetuities shall not apply to a disposition consisting of the conferring of an option to acquire for valuable consideration an interest reversionary (whether directly or indirectly) on the term of a lease if –
>
> (a) the option is exercisable only by the lessee or his successors in title, and
>
> (b) it ceases to be exercisable at or before the expiration of one year following the determination of the lease.
>
> This subsection shall apply in relation to an agreement for a lease as it applies in relation to a lease, and 'lessee' shall be construed accordingly.
>
> (2) In the case of a disposition consisting of the conferring of an option to acquire for valuable consideration any interest in land, the perpetuity period under the rule against perpetuities shall be twenty-one years, and section 1 of this Act shall not apply:
>
> provided that this subsection shall not apply to a right of pre-emption conferred on a public or local authority in respect of land used or to be used for religious purposes where the right becomes exercisable only if the land ceases to be used for such purposes."

50. The effect of s. 9(1) is to disapply the rule against perpetuities in respect of an option for a lessee to acquire the freehold (or superior leasehold) interest in the property that is the subject of the lease, provided that the option ceases to be exercisable within a year of the end of the lease. For all other options to acquire interests in land, s. 9(2) sets out a strict 21-year perpetuity period, subject to the proviso for public authority pre-emption rights in respect of land used for religious purposes.

51. Thirdly, under s. 10, where a disposition is void for remoteness, it is also treated as void as between the contracting parties, thereby extinguishing any subsisting personal obligation.

52. Section 15 of the 1964 Act, as amended by the 2009 Act, includes the following provisions specifying the scope and interpretation of the Act:

> "(5) The foregoing sections of this Act shall apply (except as provided in section 8(2) above) only in relation to instruments taking effect after the commencement of this Act, and in the case of an instrument made in the exercise of a special power of appointment shall apply only where the instrument creating the power takes effect after that commencement …
>
> (5A) The foregoing sections of this Act shall not apply in relation to an instrument taking effect on or after the day appointed under section 22(2) of the Perpetuities and Accumulations Act 2009 (commencement), but this shall not prevent those sections applying in relation to an instrument so taking effect if –
>
> (a) it is a will executed before that day, or
>
> (b) it is an instrument made in the exercise of a special power of appointment, and the instrument creating the power took effect before that day.
>
> …
>
> (6) This Act shall apply in relation to a disposition made otherwise than by an instrument as if the disposition had been contained in an instrument taking effect when the disposition was made."

53. The 2009 Act more radically changed the law on perpetuities. Section 1(1) of that Act provides that "The rule against perpetuities applies (and applies only) as provided by this section." The remainder of the section sets out a limited set of circumstances to which the rule against perpetuities continues to apply, for which (as provided in section 5(1)) the perpetuity period is specified as being 125 years. Those circumstances do not include the grant of an option to acquire an interest in land. The effect of s. 1(1) is therefore to abolish the rule against perpetuities in relation to options.

54. Section 15(1) provides:

> "Sections 1, 2, 4 to 11, 13 and 14 apply in relation to an instrument taking effect on or after the commencement day, except that –
>
> (a) those sections do not apply in relation to a will executed before that day, and
>
> (b) those sections apply in relation to an instrument made in the exercise of a special power of appointment only if the instrument creating the power takes effect on or after that day."

55. These commencement provisions therefore mirror the provisions of s. 15(5) and (5A) of the 1964 Act, ss. (5A) having been inserted pursuant to s. 16 of the 2009 Act. Under both Acts there is a specific exclusion for wills executed prior to the entry into force of the Act, and instruments made pursuant to a special power of appointment (as defined in s.

7 of the 1964 Act and s. 11 of the 2009 Act) where the power is created prior to the entry into force of the Act.

56. The commencement day for the 2009 Act was 6 April 2010. Under s. 19:

> "If provision is made in relation to property otherwise than by an instrument, this Act applies as if the provision were contained in an instrument taking effect on the making of the provision."

57. It is common ground that the combined effect of s. 1(1) and s. 15 of the 2009 Act is that the rule against perpetuities does not apply to options that are granted on or after 6 April 2010: *Cosmichome v Southampton CC* [2013] EWHC 1378 (Ch), [2013] 1 WLR 2436, §48.

The issues in dispute

58. The central issue in dispute is whether the second freehold option is valid and enforceable (as Crest contends) or whether it is void as a result of the operation of the rule against perpetuities (as the Calverts contend). The practical effect of the dispute is that if the Calverts are correct, then the parties' attempt to agree an option extending beyond the 21-year perpetuity period under the 1964 Act, through the structure of the 2002 agreement described above, will have failed. The consequence of that would be to leave the Calverts free to renounce the second freehold option, and thereby able either to retain the North and West Land for their own uses, or to negotiate a sale to Crest on different terms, or to dispose of it elsewhere if they wish rather than selling it to Crest.

59. Ms Wicks contended that the rule against perpetuities has no application to the second freehold option for three main (sets of) reasons:

    i) The 2009 Act applies to the grant of the second freehold option upon the exercise of the lease option on 19 September 2023, by operation of the commencement provisions in s. 15(1). Accordingly, under the 2009 Act, no perpetuity period applies and the grant of the option is valid and enforceable. Alternatively, the 2009 Act applies because the 2002 agreement was varied by (among other things) the 2010 agreement, which took effect after the entry into force of the 2009 Act. Alternatively, at the very least, since the option relating to the Third Property was only added into the option arrangements by the 2010 agreement, the 2009 Act must apply to the option for that property.

    ii) If and in so far as the 2009 Act does not apply and the relevant governing rule against perpetuities is as set out in the 1964 Act, the lease/licence attached to the 2002 agreement (as amended) sets out an agreement for a lease, rather than a licence, and the second freehold option is on that basis exempted from the rule against perpetuities under s. 9(1) of the 1964 Act. If necessary, clauses inconsistent with the grant of a lease should be excised from the agreement when executed.

    iii) If and in so far as the 1964 Act applies, and Crest is only entitled under the 2002 agreement to a licence, the correct interpretation of s. 9(2) of the 1964 Act is that the 21-year perpetuity period will only run from the date of the grant of the second freehold option upon the execution of the licence agreement; and that period has not yet expired. Alternatively, even if the 21-year period started running in 2002,

that was only the case in respect of the East and West Land, since no interest arose in relation to the Second and Third Properties until those properties were added to the arrangements under the 2006 and 2010 agreements.

60. Ms Tozer's submission was that:

i) The 2002 agreement created an immediate interest in the freehold of the land covered by the option, to which the 2009 Act did not apply. This included not only the East and West Land but also the Second and Third Properties. The variation of that agreement by (among others) the 2010 agreement was not sufficient to bring the option within the terms of the 2009 Act.

ii) The 1964 Act therefore applies, and the exemption in s. 9(1) of that Act does not apply because on its true construction the lease/licence created an agreement for a licence rather than a lease. The clauses suggesting the grant of a lease should be ignored as being a pretence.

iii) The second freehold option is therefore subject to the 21-year perpetuity period specified by s. 9(2) of the 1964 Act, which started to run on the date of the 2002 agreement, and which therefore expired on 25 September 2023.

61. The parties' arguments raise three main issues, which I will address in essentially the order in which Ms Tozer's submissions were structured:

i) Issue 1: Did the 2002 agreement create an immediate interest in land arising under the second freehold option, such that any perpetuity period started to run from that date? If so, what is the position of the Second and Third Properties that were brought into the option arrangements by the 2006 and 2010 agreements?

ii) Issue 2: Does the grant of the second freehold option fall under the terms of the 2009 Act, whether by operation of s. 15(1) or by the effect of the 2010 variation agreement?

iii) Issue 3: If and in so far as the answer to Issue 2 is "no", such that the 1964 Act is applicable in this case, does the lease/licence on its true construction and/or by operation of the doctrine of pretence/sham create an agreement for a lease, so as to bring the agreement within s. 9(1) of that Act, or an agreement for a licence, which would fall under s. 9(2)?

Issue 1: The effect of the 2002 agreement

62. The first issue concerns the effect of the 2002 agreement, and specifically the extent to which that agreement created an immediate albeit contingent interest in the land that was the subject of the second freehold option. This issue is relevant to the question of whether, under the 1964 Act, the 2002 agreement should be regarded as a "disposition" conferring the second freehold option, within the meaning of s. 9(2) of that Act, if that provision is applicable in this case. It is also (on Ms Tozer's case) relevant to the question of the application of the 2009 Act.

63. Ms Tozer argued that the effect of the 2002 agreement was to create an immediate equitable interest arising under the second freehold option, albeit that this was an interest

contingent on the exercise of the lease option. If, therefore, the 1964 Act is applicable in the present case, and if the lease/licence is to be interpreted as an agreement for a licence rather than a lease, the 2002 agreement was a "disposition consisting of the conferring of an option to acquire for valuable consideration any interest in land" under s. 9(2) of that Act. Ms Tozer said that the wording of s. 9(2) is wide enough to cover the grant of a "doubly contingent" option, in the sense of an option to be granted a further option. The contrary would, she said, undermine the purpose of the rule against perpetuities, which was to limit the extent to which land could be tied up for the future.

64. Ms Wicks doubted whether a contract or option to be granted an option created an immediate equitable interest in the land which is the subject of the second option. She also submitted that, if the 1964 Act is applicable, the 2002 agreement was in any event not a "disposition consisting of the conferring of" the second freehold option, within the meaning of s. 9(2) of the 1964 Act, because the second freehold option was not granted under the 2002 agreement. The only "dispositions" in 2002 were the grant of the first freehold option and the lease option, both of which were dispositions within the meaning of s. 9(2) of the 1964 Act. By contrast, on Ms Wicks' analysis, there was only a "disposition" conferring the second freehold option 19 September 2023, when the lease option was exercised.

65. It is long-established that the grant of an unconditional option to acquire an interest in land creates an equitable interest in that land. That is an immediate interest, since the right to call for a conveyance of the property is immediately vested in the grantee of the option *London & SW Railway v Gomm* (1882) 20 Ch D 562, 581.

66. *Barnsley's Land Options* (8th ed, 2026), §2-061 expresses the view that a conditional option also gives rise to an immediate equitable interest from the date of its creation, notwithstanding the conditions which must be fulfilled before the option is exercisable. Ms Wicks was content to accept that proposition. A typical example is where an option to acquire land is exercisable by the grantee only if planning permission is granted for development of the land. That was, in fact, precisely the position in the present case for the lease option under clause 7.1 of the 2002 agreement, which Ms Wicks accepted was a "disposition" within the meaning of s. 9(2) of the 1964 Act.

67. An agreement to grant an option at a specified point in the future has also been regarded as "disposition consisting of the conferring of an option" within the meaning of s. 9(2) of the 1964 Act: *Wilson v Truelove* [2003] EWHC 750 (Ch), §§8–9. That case concerned an agreement under which an option to purchase property was to be granted once two of the named parties to the agreement had both died. Mr Simon Berry QC (sitting as a deputy High Court judge) considered that the option had become void by reason of s. 9(2), rejecting the argument that the perpetuity period did not begin until the fulfilment of the condition for the grant of the option.

68. That analysis is consistent with the fact that s. 9(1) of the 1964 Act specifically provides that the exclusion in that subsection, which applies to an option to acquire an interest reversionary on the term of a lease, applies in relation to an "agreement for a lease" in the same way that it applies in relation to a lease. The implication is that an agreement to be granted a lease containing an option to acquire an interest reversionary on the term of the lease would otherwise have fallen within the scope of s. 9(2).

69. Neither Ms Wicks nor Ms Tozer identified any authority which addressed the question of whether the same analysis should apply where, instead of an *agreement* to grant a lease containing an option to acquire the freehold, the vendor confers an *option* to take a lease containing such an option to acquire the freehold. It is, however, difficult to see why the two situations should be treated differently. In both cases the estate is tied up in a way that would, but for the rule against perpetuities, enable the option to be exercised at a remote future date.

70. As Ms Tozer pointed out, the effect of Ms Wicks' analysis would be that the 21-year period specified by s. 9(2) of the 1964 Act could be avoided by the simple device of granting a 21-year option, with a provision granting the right to obtain a further 21-year option, exercisable within the initial option period. It would, however, be entirely contrary to the policy of the 1964 Act if it were to be interpreted in that way. Notably, the parties to these proceedings clearly did *not* consider in 2002 that s. 9(2) of the Act should be given that interpretation, because if that analysis was correct then there would have been no need to structure the second freehold option as attaching to a lease: it would instead have been sufficient simply to provide an option to acquire a further option in the last year of the initial 21-year period.

71. Ms Tozer is therefore, in my judgment correct to say that the effect of the 2002 agreement was to grant an interest under the second freehold option, albeit that the option was conditional on the prior exercise of the lease option. Accordingly, if the 1964 Act (rather than the 2009 Act) is applicable to the second freehold option, and if the lease/licence agreement is on its proper construction an agreement for a licence, then the effect of s. 9(2) is that the 21-year perpetuity period for the second freehold option started to run on the date of the 2002 agreement.

72. The question is then whether that conclusion applies not only to the East and West Land, which was the subject of the 2002 agreement, but also to the Second and Third Properties (making up, together, the North Land), which were brought into the option agreements by the 2006 and 2010 agreements respectively.

73. Ms Wicks' submission was that if (contrary to her primary case) the 2002 agreement did grant an interest under the second freehold option, that interest could only have related to the East and West Land, and that any equitable interest which may have come into existence in relation to the Second and Third Properties only arose when those properties were added in 2006 and 2010. Since this point was not pleaded by Crest, Ms Wicks sought permission to amend the position if necessary to determine the dispute.

74. Ms Tozer did not oppose the grant of permission to amend Crest's pleaded case if necessary. She contended, however, that the correct analysis was that the contingent interest in the Second and Third properties should be treated as if granted in 2002 for all purposes, including the application of the perpetuities rules.

75. On this point I prefer the analysis of Ms Wicks. There was, in 2002, no disposition of any interest in relation to the Second and Third Properties. Whatever the intentions of the parties in relation to the variations in 2006 and 2010, there is no basis for construing those variations as having retrospectively created an interest in the Second and Third Properties with effect from 2002. Accordingly, in respect of the options to acquire the freehold of the Second and Third Properties, any interest under those options only arose on the dates

of the 2006 and 2010 agreements respectively, and any perpetuity period under the 1964 Act (in so far as applicable) therefore only started to run on those dates.

76. In the event, given my conclusion on Issue 2, nothing in fact turns on this point, and it is therefore not necessary for Crest to amend its pleaded case. If necessary, however, I would have given Crest permission to amend.

Issue 2: Applicability of the 2009 Act

77. Ms Wicks' argument that the 2009 Act applies to the second freehold option was put in several different ways. Her primary argument relied solely on the commencement provisions under s. 15(1) of the 2009 Act, and was as follows:

    i) When the lease option was exercised on service by Crest of the 19 September 2023 lease option notice, that gave rise to a bilateral contract between Crest and the Calverts under which the Calverts were bound to grant and Crest was bound to accept both a lease or licence in respect of the North and West land (depending on the answer to Issue 2) and the second freehold option.

    ii) That contract was a specifically enforceable contract for the disposition of an interest in land. Accordingly, applying the principle that "equity looks on as done that which ought to be done" (see e.g. *Walsh v Lonsdale* (1882) 2 Ch D 9, 14–15), on service of that notice (a) Crest became lessee or licensee in equity; and (b) Crest also acquired an equitable proprietary interest in the second freehold option.

    iii) The lease option notice of 19 September 2023 was either an "instrument taking effect on or after the commencement day" within the meaning of s. 15(1) of the 2009 Act, or it was a "provision … made in relation to property otherwise than by an instrument" within the meaning of s. 19 of the 2009 Act, such that it is treated as if it were an instrument taking effect on the same day. In either case the effect of s. 15(1) is that the 2009 Act governs the notice and the equitable grant of the second freehold option arising from it. Accordingly, that option is not subject to the rule against perpetuities, and is valid and enforceable. This conclusion, as Ms Wicks submitted, applies irrespective of whether the 2002 agreement itself also give rise to an earlier equitable interest under the second freehold option in respect of some or all of the land (the point addressed under Issue 1 above).

78. There was no dispute as to the first two of those propositions. Ms Tozer's submissions therefore focused on the third limb of the argument. Her argument was that the 2009 Act does not operate retrospectively so as to validate options that had already been granted prior to the commencement of the Act. Accordingly, to the extent that contingent interests had already arisen under the second freehold option prior to the commencement day for the 2009 Act, she submitted that those interests remained governed by the 1964 Act. In other words, her argument was that the second freehold option was "fixed" with the perpetuity rules that applied when the interests under that option were first granted, and the 2009 Act could not subsequently alter the applicable perpetuity period(s).

79. As set out above, under s. 15(1) of the 2009 Act, s. 1 of that Act (among others) applies to an "instrument taking effect on or after the commencement day". In her opening skeleton argument Ms Tozer accepted that a notice by which an option is exercised is itself an "instrument". The lease option notice in this case took effect on 19 September

2023, long after the commencement day for the 2009 Act (i.e. 6 April 2010). The lease option notice was therefore an instrument taking effect on or after the commencement day, to which s. 15(1) should in principle apply. If that is the case, the effect of the 2009 Act is that the rule against perpetuities does not apply to the rights arising under the lease option notice, which include the equitable right in the second freehold option.

80. To contend otherwise, Ms Tozer had to say that there is something in the 2009 Act which prevents it from applying where an equitable right arising under an instrument within the scope of s. 15(1) has already come into existence in some form prior to the commencement day under the Act. There is, however, nothing in s. 15(1) of the 2009 Act (or indeed elsewhere in the 2009 Act) to indicate such a limitation. On the contrary, s. 15(1) expressly excludes from its application only two types of instrument that take effect after the commencement day: wills executed before that day (s. 15(1)(a)), and instruments made in the exercise of a special power of appointment if the instrument creating the power takes effect before that day (s. 15(1)(b)). Those specific and limited exclusions indicate that in all other cases the question is simply whether the relevant instrument takes effect on or after the commencement day.

81. I do not accept Ms Tozer's submission that the exclusion in s. 15(1)(b) indicates an intention to exclude from the scope of s. 15(1) *all* instruments that crystallise a prior contingent interest. It would have been possible to set out a more general exclusion for prior contingent interests, but s. 15(1) noticeably did not do so. Indeed, as Ms Wicks noted, there are previous examples of property-related legislation where the relevant Act excluded transactions made pursuant to a contract entered into before the Act came into force. One such example is s. 1(6) of the Landlord and Tenant (Covenants) Act 1995, which excludes from the operation of that Act a tenancy that is granted on or after the commencement date of the Act, but pursuant to an option granted before that date. No such exclusion is provided in s. 15(1) of the 2009 Act.

82. Contrary to Ms Tozer's submissions, that analysis does not imply that the 2009 Act retrospectively validates a disposition that had already become void prior to the commencement day for the Act. Ms Wicks did not suggest that the 2009 Act should be given that effect. Nor would the application of the 2009 Act in this case require that conclusion. If one assumes, as Ms Tozer contended, that the lease/licence created an agreement for a licence rather than a lease, and that (as I have found under Issue 1) the 21-year perpetuity period under s. 9(2) of the 1964 Act started running for the second freehold option in respect of the East and West Land on the date of the 2002 agreement, then that period expired on 25 September 2023. Under the "wait and see" rule in s. 3(3) of the 1964 Act, a disposition is not treated as void until the perpetuity period actually expires. Accordingly, service of the lease option notice on 19 September 2023 took place before the second freehold option had become void under s. 9(2). (The position is *a foriori* for the Second Property, for which the perpetuity period did not start running until May 2006; and it follows from my analysis above that no interest arose in relation to the Third Property until after the commencement day for the 2009 Act.)

83. The answer to Issue 2 is therefore that the 2009 Act applies to the lease option notice and the grant (in equity) of the second freehold option, with the consequence that the option is not subject to the rule against perpetuities. It is therefore unnecessary to consider Ms Wicks' alternative arguments in relation to this issue, concerning the effect of the variation of that agreement by the 2010 agreement.

Issue 3: Lease or licence?

84. My conclusion on Issue 2 means that it is not necessary to consider Issue 3 in order to determine the question of whether the second freehold option remains valid and enforceable. Issue 2 is, however, relevant to the question of what form of agreement should now be executed following Crest's exercise of the lease option. This issue was, moreover, the subject of extensive submissions at the hearing, including by reference to the witness evidence, so it is in any event appropriate to address the point in case the matter goes further.

85. The question under Issue 3 is whether the lease/licence on its true construction, creates an agreement for a lease, or an agreement for a licence. That has important consequences, if my conclusion on Issue 2 is incorrect:

    i) If the agreement is for a *lease*, the consequence is that even if (contrary to my conclusion on Issue 2) the 1964 Act is applicable to the grant of the second freehold option, that option is nevertheless governed by s. 9(1) of that Act. That provision disapplies the rule against perpetuities to the grant of an option to acquire an interest reversionary on the term of a lease, provided that the option ceases to be exercisable within a year of the end of the lease, which was the case here. The option would therefore in this case remain enforceable by Crest.

    ii) If, however, the agreement is for a *licence*, then if the 1964 Act is applicable, the governing provision is s. 9(2). For the reasons set out under Issue 1 above, the 21-year period under that provision started to run on the date of the 2002 agreement, i.e. 25 September 2002, and expired on 25 September 2023. Accordingly if s. 9(2) applies, the second freehold option became void for perpetuity on 25 September 2023 and can no longer be exercised.

86. Ms Tozer's submission was that on its true construction, the lease/licence does not confer a right of exclusive possession on Crest, and it therefore creates an agreement for a licence rather than a lease. Alternatively, if the lease/licence *does* purport to confer a right of exclusive possession, that is a pretence and the true agreement was that Crest should not have a right to exclusive possession.

87. A central contention in relation to both of these arguments was Ms Tozer's submission that a right of exclusive possession requires there to be a right of exclusive occupation. In the present case, clause 6.3 of the lease/licence specifically provides that Crest will *not* obtain any right of occupation under the agreement, and Ms Tozer pointed to other provisions of the agreement that confirm that the Calverts are to remain the exclusive occupiers of the land under the lease/licence, with Crest having only a limited right of access for particular purposes. On that basis Ms Tozer said that the agreement does not grant a right of exclusive possession and therefore cannot be interpreted as an agreement for a lease.

88. Ms Wicks' case was that the lease/licence is properly to be construed as granting a right of exclusive possession, and that its provisions do not constitute a pretence or sham. She submitted that the grant of a right of exclusive possession does not require the grant of a right of occupation, and that clause 6.3 of the lease/licence is therefore not inconsistent with the interpretation of the agreement as a lease rather than a licence. In the alternative, she submitted that if the court concludes that the objective intention of the 2002

agreement was that Crest should have a lease, but that any particular term of the lease/licence would conflict with the grant of a lease, then the court should excise that term from the agreement to be executed by the Calverts.

89. The parties' arguments on this issue turn on three questions:

i) What is the legal test for determining whether an agreement creates a lease or a licence, and in particular what a right of exclusive possession requires?

ii) On its true construction, does the lease/licence confer a right of exclusive possession, and should the court excise any terms conflicting with that right?

iii) If the lease/licence does purport to grant a right of exclusive possession, is that a pretence or sham?

Lease or a licence: the legal test

90. Where a landlord grants a right of exclusive possession for a term at a rent, that grant will constitute a lease. Without exclusive possession, the agreement is not a lease and does not create any estate in the land. The classic statement of this point is by Lord Templeman in *Street v Mountford* [1985] AC 809, p. 816:

> "The tenant possessing exclusive possession is able to exercise the rights of an owner of land, which is in the real sense his land albeit temporarily and subject to certain restrictions. A tenant armed with exclusive possession can keep out strangers and keep out the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement to enter and view and repair. A licensee lacking exclusive possession can in no sense call the land his own and cannot be said to own any estate in the land. The licence does not create an estate in the land to which it relates but only makes an act lawful which would otherwise be unlawful."

91. The concept of exclusive possession was further elaborated by the House of Lords in *JA Pye (Oxford) v Graham* [2002] UKHL 30, [2003] 1 AC 419, where at §40 Lord Browne-Wilkinson identified the two elements necessary for a party to have legal possession as being (1) a sufficient degree of physical custody and control, i.e. factual possession, and (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit, i.e. an intention to possess. At §41 he defined factual possession by reference to the following comments in judgment of Slade J in *Powell v McFarlane* (1977) 38 P&CR 452 at pp 470–1:

> "Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed … Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has

> been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so."

92. While that case concerned, on its facts, whether title to land had been acquired by adverse possession, in *AP Wireless II (UK) v On Tower UK* [2024] UKUT 263 (LC), §97, Edwin Johnson J noted that the concept of possession elucidated in *Pye* was nevertheless of wider application, including for the question of whether an agreement is to be regarded as granting exclusive possession for the purposes of determining whether it constitutes a lease or a licence.

93. Exclusive possession in a tenancy agreement therefore requires not only that the tenant is able to exercise the rights of the owner to exclude all others from the property, but also that the tenant has a sufficient degree of physical control that they are able to deal with the land as an occupying owner.

94. While exclusive possession will often overlap with exclusive occupation, an occupier of land may or may not have a right of exclusive possession. If they do not, they are not a tenant, but occupy in a different capacity, e.g. as a licensee or a trespasser: see *Stewart v Watts* [2016] EWCA Civ 1247, §31. Equally, a tenant who has a right of exclusive possession may sublet the land, such that they do not themselves occupy it: *Camden v Shortlife Community Housing* (1993) 25 HLR 330, at p. 347, and *Secretary of State for the Environment v Meier* [2009] UKSC 11, [2009] 1 WLR 2780, §32. A lease may also contain terms restricting the right of the tenant physically to occupy the premises for a certain period of the year, such as clauses in holiday chalet leases which specify that the tenant will not occupy the premises during January and February of each year (see e.g. *Phillips v Goddard* [2011] UKUT 346 (LC), §1).

95. It is therefore clear that the right to exclusive possession is not the same as factual exclusive occupation. The question of whether the agreement confers a right of occupation in principle (whether or not that right is exercised by the tenant personally, or is sublet to a subtenant) is, however, plainly relevant in determining whether the agreement is to be interpreted as granting exclusive possession, because it informs the question of whether the agreement grants the tenant a sufficient degree of physical control over the property that their interest can be characterised as one of "possession". *AP Wireless*, which was relied upon by Ms Wicks, reinforces the relevance of the right of occupation, at §256.

96. While Ms Wicks referred to cases such as *Phillips v Goddard* where a tenancy agreement contained limited temporal restrictions on physical occupation of the premises, I was not shown any authority suggesting that an agreement can be construed as granting a right of exclusive possession, where it provides that the grantor will remain in occupation, while the grantee will have no right of occupation and is permitted only limited rights of access to the property for defined purposes.

97. Whether or not the agreement grants a right of exclusive possession is a matter of construction of the substance of the agreement, rather than the label attached to it. As Lord Templeman put it in *Antoniades v Villiers* [1990] 1 AC 417, p. 463, "where the language of licence contradicts the reality of lease, the facts must prevail". The parties cannot, therefore, convert an agreement to give exclusive possession into a licence by calling it one: *Street v Mountford*, p. 821. Nor, by parity of reasoning, can what is in

substance a licence without exclusive possession be converted into a lease by inserting provisions describing the agreement as a lease.

98. The relevant principles of contractual construction were summarised in *EMFC Loan Syndications v The Resort Group* [2021] EWCA Civ 844, [2022] 1 WLR 717, §§56–58 as follows:

> "56. The relevant well-known legal principles of contractual construction are non-contentious and to be found in a series of recent cases, including *Rainy Sky SA v Kookmin* Bank [2011] W WLR 2900; *Arnold v Britton* [2015] ACT 1619 and *Wood v Capita Insurance Services Ltd* [2017] AC 1173.
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> 57. In summary only then, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood the language in the contract to mean. It does so by focusing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of the natural and ordinary meaning of the clause, any other relevant provisions of the contract, the overall purpose of the clause and the contract, the facts and circumstances known or assumed by the parties at the time that the document was executed and commercial common sense, but disregarding evidence of the parties' subjective intention. While commercial common sense is a very important factor to be taken into account, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed. The meaning of a clause is usually most obviously to be gleaned from the language of the provision. Where the parties have used unambiguous language, the court must apply it; if there are two possible constructions, the court is entitled to prefer the construction consistent with common sense and to reject the other (*Rainy Sky SA v Kookmin Bank* (supra), at paras 21 and 23).
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> 58. In *Wood v Capital Insurance Services Ltd* (supra), at paras 9–11 Lord Hodge JSC described the court's task as being to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise focused solely on a 'parsing of the wording of the particular clause'; the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."

99. The reference to consideration of the purpose of the relevant clauses and the contract should not, however, be understood as allowing the court to take account of the parties' intentions to bring the agreement within a particular statutory regime. Lord Templeman made clear in *Street v Mountford*, pp. 819 and 822–3 that the relevant question was whether the agreement conferred exclusive possession, and it was not relevant to consider the consequences of that for the application (or otherwise) of the Rent Acts.

Construction of the lease/licence agreement

100. There is no dispute that the lease/licence in the present case was specified as being for a term (as calculated by the formula in clause 1.1 of the 2002 agreement), and for a rent (one peppercorn). What is disputed is whether the lease/licence is to be construed as granting a right of exclusive possession.

101. There is no doubt that both Crest and the Calverts intended that the lease/licence should have the effect of granting a lease, in order to bring the arrangement within the scope of s. 9(1) of the 1964 Act, and thereby to enable an option to be granted (under the lease) beyond the 21-year perpetuity period then applicable to options under s. 9(2) of the 1964 Act. That was, indeed, the sole purpose of inserting the lease option and second freehold option into the option arrangements. As set out above, however, the intention to bring the transaction within a particular statutory regime is not relevant to the assessment of whether an agreement has in substance the effect of conferring a right of exclusive possession.

102. The fact that the lease/licence agreement is described throughout as a draft "lease" is also not determinative. That is clear in the authorities and was not disputed. What is relevant is rather the legal effect of the rights granted by the agreement.

103. In that regard, as Crest points out, there are various provisions in the agreement that are consistent with the grant of a right of exclusive possession. In particular, clause 2 provides that the landlord "demises" the premises to the tenant; clause 3.1.4 provides an apparently limited right of entry by the landlord for the purposes of inspecting the premises and complying with the landlord's obligations under the lease; and clause 4.1 provides that if the tenant observes the covenants and obligations in the lease, the tenant "may peaceably hold and enjoy the Premises during the term without any lawful interruption or disturbance from or by the Landlord or any person claiming through under or in trust for the Landlord".

104. In addition, as set out above, the 2002 agreement required Crest to grant a farm business tenancy to the Calverts upon completion of the lease, and as a condition of the lease. That, Ms Wicks submitted, indicated that the parties intended that Crest would have a sufficient interest in land to be able to sublet an estate in land to the Calverts under the farm business tenancy.

105. The problem with these submissions is, however, that when the substance of the lease/licence agreement is examined, it is clear that the effect of the agreement is *not* to grant to Crest the right of exclusive possession of the property, or indeed any right of possession at all:

    i) Clause 6.3 provides, in unambiguous terms, that the tenant "shall not be or become entitled to occupy the Premises and shall not be entitled to exercise any rights in respect thereof save as specifically granted herein and in the [First] Schedule to this Lease …"

    ii) Schedule 1, §6.6.2 provides that once the second freehold option is exercised, the tenant will be entitled to enter the relevant parts of the property for the purpose of carrying out remedial works.

iii) Schedule 1, §11.1.1 specifies that the landlord will not use the property "except for its existing use or (if different) for similar operations which would not materially reduce the prospect of obtaining a Planning Permission and which would not materially increase the expense of or reduce the value of the Development thereof …".

iv) Schedule 1, §11.1.5 specifies that the landlord will not permit access to the property by any member of the public and would provide and maintain adequate fencing to prevent any such access.

v) Schedule 1, §17 provides that the tenant will have access to the property for the purposes "only" of carrying out site surveys, soil tests, monitoring purposes, planting trees, and other similar specified purposes, subject to providing reasonable notice in writing to the landlord, making good any damage caused, and taking reasonable precautions to protect the safety of livestock on the property.

vi) Schedule 1, §24.5.2 refers to the "obligations of the Landlord to give vacant possession on completion", i.e. when the land is purchased pursuant to the second freehold option.

106. Those provisions make clear that upon exercise of the lease option the Calverts will remain in occupation of the land, and will continue their existing use of the land until purchased pursuant to the second freehold option; that the Calverts, rather than Crest, will be responsible for preventing third party access to the property; and that Crest will enjoy only limited rights of access to the property for purposes mainly relating to surveying and monitoring.

107. On the basis of these provisions, it is impossible to describe the lease/licence as conferring a substantive right of exclusive possession on Crest. On the contrary, it is clear that Crest will *not* obtain any right of possession, but will only obtain very limited rights of access to the property, on giving notice to the Calverts. The purported limited right of entry by the landlord under clause 3.1.4 does not reflect the substance of the arrangement, under which the Calverts will remain in possession throughout (as underscored by clause 6.3 and the terms of Schedule 1). Likewise, the right of peaceful enjoyment apparently granted by clause 4.1 is meaningless: the lease/licence does not grant Crest any right to enjoy the property "without" disturbance from the landlord, because the substance of the agreement enables the Calverts to remain in occupation of the property to the exclusion of Crest. In such circumstances the lease/licence agreement cannot sensibly be described as conferring on Crest the rights characteristic of an owner, such that the land could be regarded as "Crest's land" for the duration of the specified term.

108. The provisions of Schedule 1 are moreover, as Ms Tozer pointed out, lifted verbatim from the provisions of the original 2002 agreement. I agree with Ms Tozer's submission that this provides a clear indication that the commercial intention was that the rights to use the land would in substance remain precisely the same under the lease/licence as they had been during the initial option period of 20–21 years under the 2002 agreement. That also made sense in the context of the commercial dealings between the parties. Crest is a property developer, not a farming enterprise. All it needed, in reality, was the limited right of access granted under the lease/licence. For its purposes it had no interest in any more extensive possession of the North and West land prior to the acquisition of all or part of that land under the second freehold option.

109. If the lease/licence agreement does not confer a right of exclusive possession, that raises the question of the effect of the draft farm business tenancy. The effect of the decision of the House of Lords in *Bruton v London & Quadrant Housing* [2000] 1 AC 406 is that it is possible for a person who does not have a lease to grant a sublease that operates as between the parties, even if it does not confer a proprietary interest. In principle, therefore, the farm business tenancy can be granted by Crest even if it only obtains a licence. As Ms Tozer said, however, the farm business tenancy would in that case be largely ineffective and pointless, since the Calverts will retain possession and will not need the farm business tenancy to grant that right.

110. I agree with Ms Wicks that the existence of the draft farm business tenancy reflects an objective intention by the parties that the lease/licence agreement should have the effect of granting a lease. It bears repeating, however, that the critical question is not whether the intention was to grant a lease (which is not disputed) but whether the lease/licence is to be construed as granting a right of exclusive possession. In that regard, the existence of the draft farm business subtenancy cannot override the unambiguous effect of the clauses of the lease/licence under which, as I have found, the agreement does not in substance confer any right of exclusive possession.

111. Finally, Ms Wicks suggested that if some of the terms of the lease/licence agreement are inconsistent with the grant of a lease, they should be excised by the court pursuant to clause 7.4 of the 2002 agreement, which permits such amendments to the lease/licence agreement "as either party shall reasonably require", provided that the amendments do not change the commercial effect of the agreement. Ms Wicks also referred to the validity principle, which proceeds on the premise that the parties to a contract will have intended it to be valid. Accordingly, where a clause in the contract is capable of having two meanings, one which would result in its being void, and the other which would result in its being valid, the latter is to be preferred: *Egon Zehnder v Tillman* [2019] UKSC 32, [2020] AC 154, §38.

112. There is, however, no ambiguity in the provisions of the lease/licence agreement set out at §105 above. Those provisions are clear and unambiguous, and are moreover consistent with the commercial intention as indicated by the provisions of Schedule 1, namely that the Calverts should remain in possession until the option to purchase the freehold is exercised by Crest.

113. My conclusion is therefore that the lease/licence is properly to be construed as an agreement for a licence (and therefore within s. 9(2) of the 1964 Act) and not a lease (within s. 9(1) of the Act).

Pretence or sham

114. Ms Tozer's fallback argument was that the terms of the lease/licence agreement suggestive of a lease are a pretence, whose object is to disguise a licence as a lease in order to take advantage of the exception to the perpetuities rule in s. 9(1) of the 1964 Act. It is unnecessary to determine this point in light of my conclusion above as to the construction of the agreement. I will nevertheless make some comments about this in light of the allegations in this regard made by the Calverts, and the evidence before the court at the trial.

115. The Calverts' case on this was put on the basis of the language of pretence, rather than sham, and Ms Tozer argued that a pretence was broader than the concept of a sham. She relied in particular on *Antoniades v Villiers* at p. 462, where Lord Templeman preferred to describe the situation as a pretence rather than a sham.

116. In the same case, however, Lords Oliver and Jauncey used the language of sham; and there are authorities which use the expressions interchangeably: e.g. Neuberger J in *National Westminster Bank v Jones* [2001] 1 BCLC 98, §51 and Butcher J in *Camelot Garden Management v Khoo* [2018] EWHC 2296 (QC), §§19 and 30–39. It is, moreover, difficult to discern a clear difference between the meaning of the two expressions in this context. Whether the language of sham or pretence is used, the essence of the court's inquiry is as to whether there are contractual terms which the parties do not really intend to be effective, but are there to give the appearance of creating rights and obligations different from the rights and obligations which the parties in reality intended to create: *National Westminster Bank v Jones* [2001] 1 BCLC 98, §59. There must, on that basis, be a common intention that the agreement should not in fact create the legal rights and obligations which it gives the appearance of creating: *Global 100 v Laleva* [2022] 1 WLR 1046, §§49–50.

117. In addition, whether described as a sham or pretence, the allegation ordinarily carries an implication of dishonesty, since it requires a finding that the parties intended to deceive third parties and/or the court. The courts are therefore slow to conclude that an agreement is a sham or pretence, and the burden lies firmly on the party advancing the allegation to establish it on the evidence: *National Westminster Bank*, §§46 and 68; *Camelot*, §§19(6) and 32.

118. It is, however, important to distinguish between a sham or pretence on the one hand, and a mutual misapprehension as to the legal effect of an agreement on the other. Where parties enter into an agreement genuinely intending it to produce a particular legal effect, and using some contractual language designed to achieve that effect, the subsequent conclusion of the court that the substance of the agreement does not, as a matter of law, have that effect does not render any provisions suggesting the contrary a sham or pretence. In such circumstances, the parties intend their legal relationship to be governed by the terms set out in the agreement, albeit under a mistaken understanding of the true legal consequences of those terms. That is fundamentally different from a situation in which the parties share a common intention that particular contractual provisions are *not* to take effect according to their terms, and are included only to create an appearance at odds with the substantive rights and obligations actually intended.

119. In the present case, the transaction was a multi-million pound commercial transaction entered into between sophisticated and well-advised parties. Crest is a very experienced property developer; Henry Calvert was a shrewd businessman, who employed a land agent (Mr Raikes) and took both legal and accountancy advice on the agreement with Crest. Piers Calvert said that, knowing how his father approached business dealings generally, he had no doubt that he would have "carefully examined all possible consequences" which might have resulted from the option agreement. Consistent with that, it is apparent that the option structure was adopted following extensive discussions involving the lawyers on both sides, during negotiations that had lasted for around a year.

120. The "non-occupational lease" structure was proposed by one of Crest's solicitors, DAC, but the contemporaneous documentary evidence shows that it was then discussed by the

Calverts and their solicitors. There was also discussion of the structure with Crest's other solicitors Campbell Hooper, acting for Crest in relation to the Hill Place Farm site. On both sides, the understanding was that a lease option was needed to provide an enforceable agreement between the parties for more than 21 years, given the period required for the development of a size of the site contemplated by the transaction. The clear intention was, therefore, to create a structure which included an option for a lease, while enabling the Calverts to continue to enjoy the occupation of the land. The materials before the court indicate that the parties and their solicitors believed that the structure of the transaction ultimately agreed would achieve those purposes.

121. None of the contemporaneous documents contain any trace of an intention, on either side, that the contractual language referring to a lease should not, in fact, reflect the true arrangement which would come into place following exercise of the lease option. There is no doubt that the parties intended that the Calverts would remain in occupation. But the correspondence between the parties indicates that both parties believed that the terms of the lease enabled the Calverts to retain their rights of occupation while still granting an effective lease to Crest (hence the concept of the "non-occupational lease"). It is, moreover, inherently improbable that multiple sets of professional advisors would have advised their clients to enter into a transaction which risked being ineffective as being a sham or pretence, particularly given the scale of the transaction and the amounts of money at stake.

122. Ms Tozer's submissions on the pretence issue turned principally on the arguments that the parties structured the option arrangements so as to avoid the perpetuity rule, and that there was an understanding that the lease would not divest the Calverts of their rights of occupation. Neither of those points was disputed by Ms Wicks; her point was, however, that neither of these turned the "lease-like" terms of the lease/licence (such as the clauses referred to at §103 above) into a sham or pretence.

123. I agree with Ms Wicks' submission on this point. There was nothing artificial about structuring the transaction in a way that was intended to engage the provisions of s. 9(1) of the 1964 Act – the parties were entitled to do so. Nor did the parties' understanding that the Calverts would retain the occupation of the property indicate an intention to portray the arrangement as something that it was not. The Calverts' continued occupation rights were not concealed in any way, but were clear on the face of the contractual documentation. Indeed, that is one of the reasons why I have concluded that the lease/licence, on its proper construction, constituted an agreement for a licence rather than a lease.

124. The situation is therefore one where the parties genuinely intended that a lease would be granted under the lease option. The clauses containing "lease-like" language therefore reflected the parties' true intentions as to the legal effect of the transaction. Accordingly, those clauses are not a sham or pretence, even if (as I have found) they do not ultimately produce the intended effect.

Conclusions

125. The effect of my conclusions on the issues set out above is as follows:

    i) The effect of the 2002 agreement was to grant an interest under the second freehold option in relation to the East and West Land. Any perpetuity period that was

applicable to that option under s. 9(2) of the 1964 Act therefore started to run on the date of the 2002 agreement, i.e. 25 September 2002. Interests in the First and Second Properties did not, however, arise until those properties were added to the option arrangements under the 2006 and 2010 agreements.

ii) Although the parties intended that the draft lease/licence agreement attached to the 2002 agreement should have the effect of granting a lease, on its proper construction that agreement does not confer a right of exclusive possession. It is therefore an agreement for a licence and not a lease.

iii) Accordingly, at the time of the 2002 agreement, the second freehold option conferred under the lease/licence agreement was governed by s. 9(2) of the 1964 Act, and the interest under that option in the freehold of the East and West Land was therefore subject to a 21-year perpetuity period expiring on 25 September 2023.

iv) In relation to the Second Property, the interest under the second freehold option was likewise, at the time of the 2006 agreement, subject to a 21-year perpetuity period under s. 9(2) of the 1964 Act, expiring on 26 May 2027. The interest in relation to the Third Property was not granted until the 2010 agreement, which took effect after the 2009 Act had entered into force, such that no perpetuity period applied.

v) Before the perpetuity periods expired, however, Crest exercised the lease option by serving a lease option notice on 19 September 2023, thereby creating an equitable interest in the freehold under the second freehold option. The lease option notice was an instrument taking effect after the commencement day for the 2009 Act, within the meaning of s. 15(1) of that Act. Accordingly, s. 1(1) of that Act applied to the lease option notice, with the result that the 21-year perpetuity period under s. 9(2) of the 1964 Act no longer applied to any interest under the second freehold option.

126. The 2009 Act therefore has the happy (for Crest) consequence of giving effect to the parties' intentions in 2002, namely to put in place option arrangements that enabled some or all of the land to be drawn down beyond the 21-year perpetuity period for option agreements under s. 9(2) of the 1964 Act. But for the provisions of the 2009 Act, the attempts to avoid the effect of s. 9(2) by granting a lease option containing the second freehold option would have failed, because of the way that the lease/licence was drafted. As it is, however, the effect of the 2009 Act is that the second freehold option remains valid and can now be exercised by Crest in relation to all of the remaining land not already acquired by it.

127. I will hear further submissions on the form of the agreements to be executed to give effect to these conclusions.